

IN THE  
**Supreme Court of the United States**  
October Term, 1985

---

CHARLES A. BOWSHER, Comptroller General of the  
United States, *Appellant,*

*v.*

MIKE SYNAR, Member of Congress, et al., *Appellees.*

---

UNITED STATES SENATE, *Appellant,*

*v.*

MIKE SYNAR, Member of Congress, et al., *Appellees.*

---

THOMAS P. O'NEILL, Jr., Speaker of the United States  
House of Representatives, et al., *Appellants,*

*v.*

MIKE SYNAR, Member of Congress, et al., *Appellees.*

---

**On Appeal from the United States District Court  
for the District of Columbia**

---

**BRIEF AMICUS CURIAE  
OF THE AMERICAN JEWISH CONGRESS**

---

NEIL H. COGAN  
*Attorney of Record*  
Storey Hall #302  
Southern Methodist University  
School of Law  
Dallas, Texas 75275  
(214) 692-2579

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
INTEREST OF THE AMICUS . . . . .	iv
SUMMARY OF ARGUMENT . . . . .	1
ARGUMENT . . . . .	2
I. THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985 VIOLATES THE FUNDAMENTAL STRUCTURE OF THE CONSTITUTION . .	2
A. The Textual Structure . . .	3
B. The Framers' Intent . . .	7
C. This Court's Decisions . .	10
CONCLUSION . . . . .	16



## TABLE OF AUTHORITIES

### Cases

<u>Fong Yue Ting v. United States,</u> 149 U.S. 698 (1893) . . . . .	13
<u>Fullilove v. Klutznik, 448 U.S.</u> 448 (1980) . . . . .	13
<u>Hampton v. Mow Sun Wong, 426</u> U.S. 88 (1976) . . . . .	12, 13
<u>Industrial Union Dept. v.</u> <u>American Petroleum Institute,</u> 448 U.S. 607 (1980) . . . . .	10, 11
<u>National Cable Television Ass'n v.</u> <u>United States, 415 U.S. 336</u> (1974) . . . . .	11, 12
<u>Panama Refining Co. v. Ryan,</u> 293 U.S. 388 (1935) . . . . .	10
<u>Regents of the University of</u> <u>California v. Bakke, 438</u> U.S. 265 (1978) . . . . .	13

### U.S. Constitution

U.S. Const. Art. I, §7, cl. 1 . . . . .	4
U.S. Const. Art. I, §7, cl. 2 . . . . .	6, 7
U.S. Const. Art. I, §8, cl. 1 . . . . .	3
U.S. Const. Art. I, §8, cl. 2 . . . . .	3, 4



U.S. Const. Art. I, §8, cl. 12 . . . . .	5
U.S. Const. Art. I, §9, cl. 4 . . . . .	7, 8
U.S. Const. Art. I, §9, cl. 5 . . . . .	8
U.S. Const. Art. I, §9, cl. 7 . . . . .	4, 5
U.S. Const. Art. II, §3 . . . . .	5
U.S. Const. Art. II, §3B . . . . .	7

#### Legislative Materials

SJR 13, 99th Cong., 1st Sess. . . . . (1985)	16
SJR 225, 99th Cong., 1st Sess. (1985) . . . . .	16

#### Other Authorities:

<u>The Federalist</u> , J. Cooke ed. (1961) . . . . .	7, 8, 9
J. Freedman, <u>Delegation of Power and Institutional Competence</u> , 43 U. Chi. L. Rev. 307 (1976) . . . . .	10
J. Rakove, <u>The Beginnings of National Politics</u> (1979) . . . . .	8



### INTEREST OF THE AMICUS

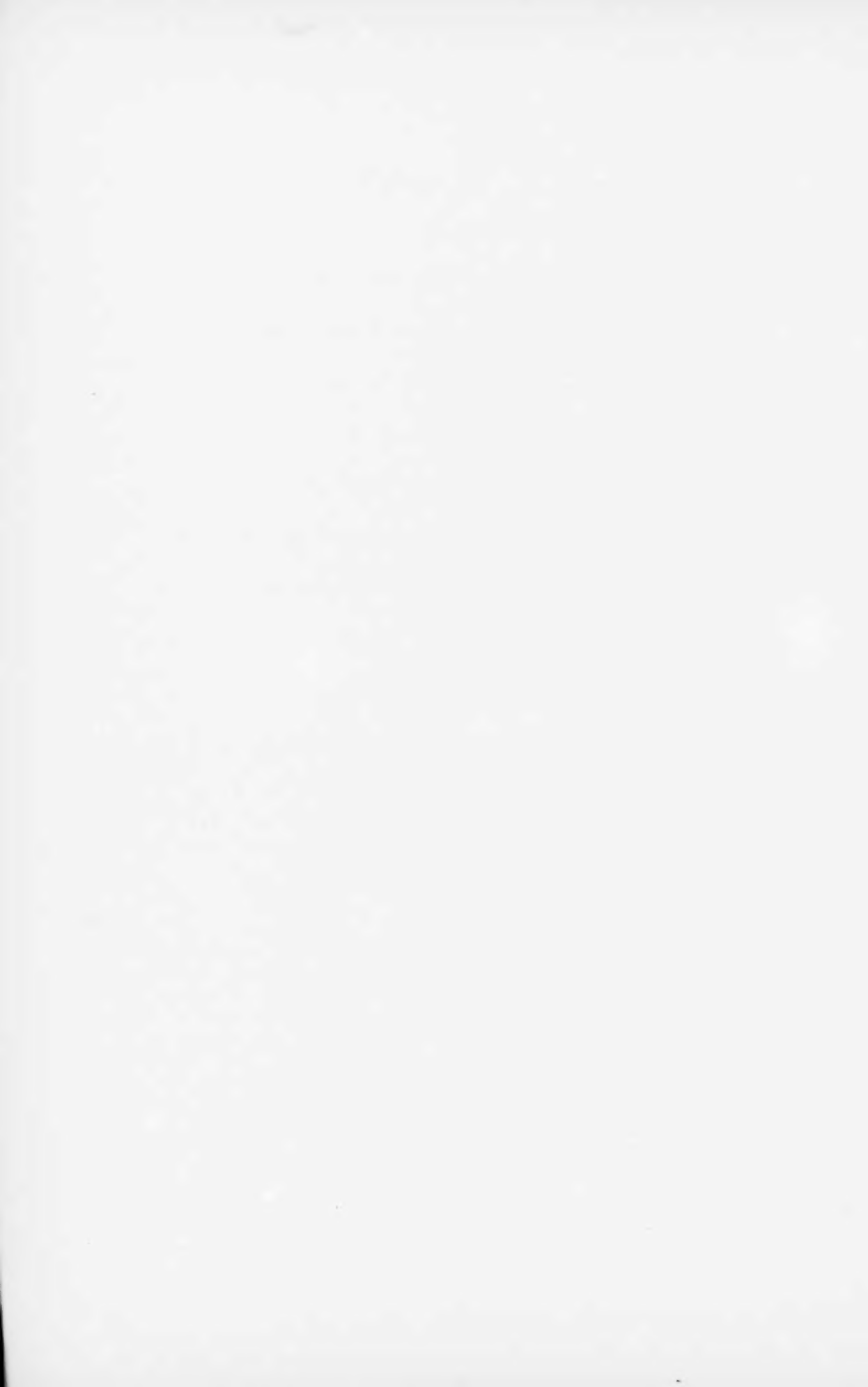
The American Jewish Congress is a membership organization of American Jews dedicated to the preservation of the political, economic, civil, and religious rights of American Jews. Its membership has set as one of its major priorities the achievement of social justice and greater economic equity. The Constitution has been interpreted to have but little to say on these economic issues. This Court has insisted that such issues are committed by the Constitution to political process. As we argue in this attached brief, the central defect of the Gramm-Rudman Balanced Budget and Emergency Deficit Reduction Act of 1985 is that it insulates these very issues from that process.





### SUMMARY OF ARGUMENT

It is unconstitutional for the Balanced Budget and Emergency Deficit Control Act of 1985 to relieve the Congress and the President of the political responsibility to make taxing and spending decisions as from time to time domestic and foreign conditions warrant. The structure of the Constitution is violated by provisions that shift such responsibility from institutions responsive to the people and competent under the Constitution to an officer neither responsive nor competent. The structure of the Constitution is violated by provisions that disable the Congress and the President from making spending decisions particularized to current conditions and that authorize an officer to make gross, unparticularized decisions.



## ARGUMENT

### I. THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985 VIOLATES THE FUNDAMENTAL STRUCTURE OF THE CONSTITUTION

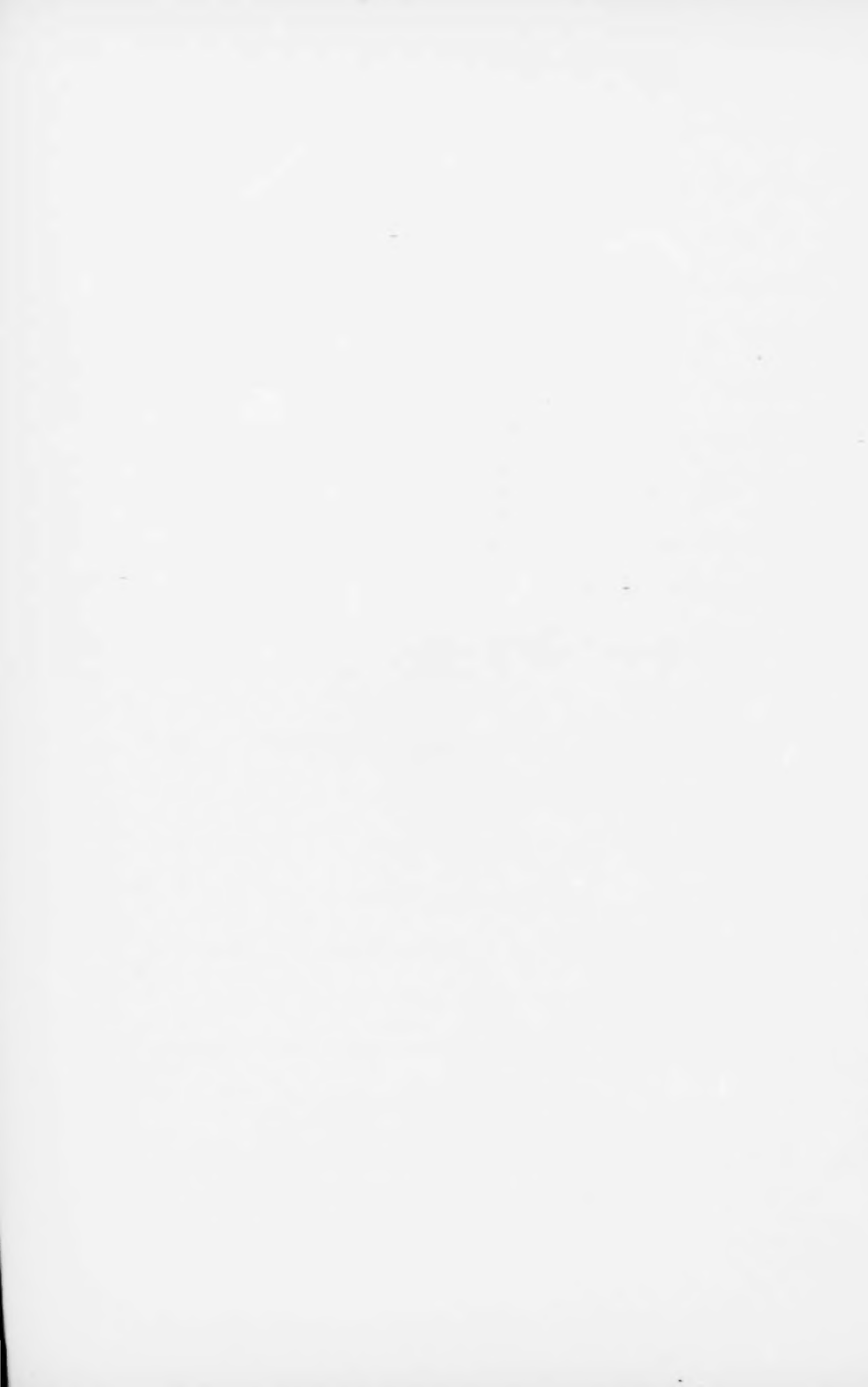
Amicus respectfully submits that the questions presented by the parties -- the constitutionality of a delegation of legislative power, and the constitutionality of a delegation to a particular federal office -- are better presented as one more general question. Is it constitutional for the Balanced Budget and Emergency Deficit Control Act of 1985 (hereafter "Gramm-Rudman") to relieve the Congress and the President of the responsibility to make taxing and spending decisions as from time to time domestic and foreign conditions warrant? Amicus submits that the structure of the Constitution -- as illumined by the text of the Constitution, the intent of the Framers and the decisions of this Court -- is violated by provisions that shift such responsibil-



ity from institutions responsive to the people and competent under the Constitution to an officer neither responsive nor competent. Amicus submits that the structure is violated by provisions that disable the Congress and the President from making spending decisions particularized to current conditions and that authorize an officer to make gross, unparticularized decisions.

A. The Textual Structure

The taxing and spending power, first among the enumerated powers of the national government, was explicitly placed in the hands of the institution most politically responsive. The Constitution provides "[t]he Congress shall have Power to lay and collect Taxes . . . to pay the Debts and provide for the Common Defense and general Welfare of the United States . . . ." U.S. Const. Art. I, § 8, cl. 1; see id., Art.



I, § 8, cl. 2 ("to borrow money on the credit of the United States"). The Constitution provides further that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . . ." id., Art. I, § 7, cl. 1, the only house that originally was directly elected by the people and the house still most politically responsive to the people.

The Constitution imposed special responsibilities upon the Congress and the President and required that they develop special competences. The Constitution provides that Congress must particularize appropriations and that the President must particularize expenditures; it provides:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipt and Expenditures of all public Money shall be published from time to time.





Id., Art. I, § 9, cl. 7. The Constitution requires the Congress to make appropriations, and take other measures, as conditions warrant; it provides for a periodic report and recommendation by the President to the Congress regarding "such Measures as he shall deem necessary."

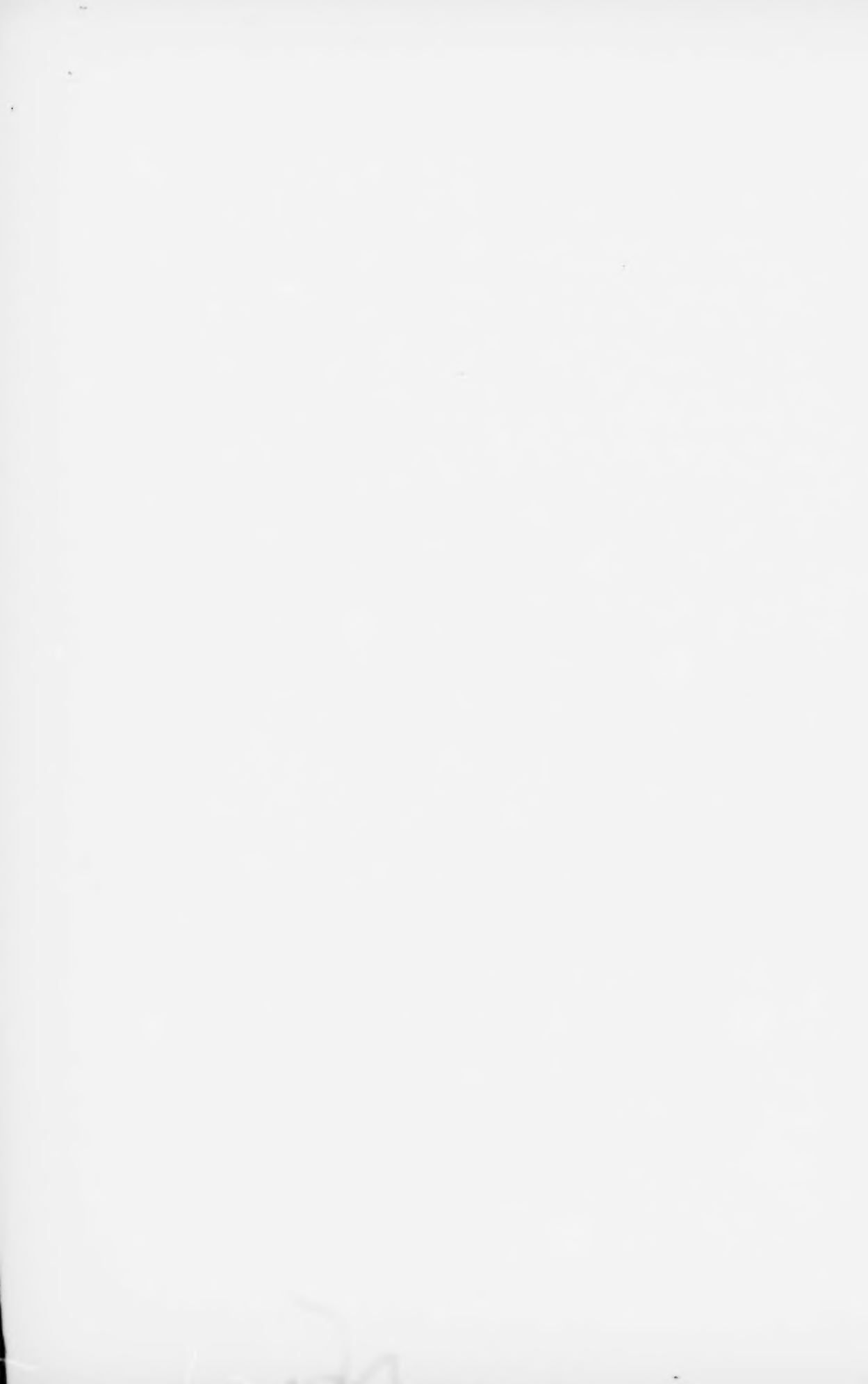
Id., Art. II, § 3. The Constitution discourages long-term commitments, especially for defense, by providing that "no Appropriation of Money to [raise and support armies] shall be for a longer Term than two Years." Id., Art. I, § 8, cl.

12. The publication of appropriations and expenditures enables the people to learn what the political departments are doing and to require that the political departments be politically responsive; the limitation on commitments disables the Congress and the President from



disregarding public opinion, at least on defense matters.

The Constitution places upon the President the responsibility to examine each bill presented by the Congress provision by provision, and, if he or she does not approve, to particularize the objections to the bill. See id., Art. I, § 7, cl. 2. Thus, in the case of a spending bill, the President has a duty to examine each appropriation and to make particularized objections as to the amount of, or need for, the appropriation. The Congress, in turn, has the responsibility to enter the President's objections on its journals and to consider them. See id. If the Congress nevertheless votes to enact the bill objected to, including a spending bill objected to, the vote must be by a roll-call and the votes of each voting member of Congress entered in the journals,



see id., so that the people will know who voted for or against the appropriations and be able to express their opinions to those persons.

Once a bill is signed or passed over a President's objections, the President has the responsibility to "take care that the laws be faithfully executed . . . ." Id., Art. II, § 3 B.

#### B. The Framers' Intent

The Framers intended that the national government have the power to tax and spend "requisite to the full accomplishment of the objects committed to its care and the complete execution of the trusts for which it is responsible." The Federalist No. 31, p. 195. J. Cooke ed. 1961 (hereinafter "The Federalist").\*<sup>1</sup> Other remarks in Alexander Hamilton's Federalist essays make this apparent.

The need for a national government with

---

\*<sup>1</sup> There was of course a prohibition on a "capitation, or other direct, Tax," U.S. (cont'd next page)



a "full" and "complete" power to tax and spend was a primary motive for the calling of the Constitutional Convention. See The Federalist No. 30, p. 189; J. Rakove, The Beginnings of National Politics xiv, xv (1979). The Framers believed that the "structure of the government" was the best protection against abuse of the taxing and spending power. The Federalist No. 31, p. 197; this structure included decision-making by "[i]nquisitive and enlightened Statemen," who were "deemed everywhere best qualified" for such decisions. The Federalist No. 36, p. 224. Ultimately, of course, protection lay in "the Prudence and firmness of the people." The Federalist No. 31, p. 198.

---

Footnote\*1 cont'd

Const., Art. I, § 9, cl. 4, and there still is a prohibition on a tax on "Articles exported from any State." Id., cl. 5. Alexander Hamilton's Federalist essays make this apparent.





The Framers believed it was improper and unwise to disable the new national government from raising and spending "fresh resources" in the event of a crisis. The Federalist No. 30, p. 192. Hamilton said:

As the duties of superintending the national defence and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers, to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

The Federalist No. 31, p. 196. Responding to arguments that there should be fixed limits on national expenditures, Hamilton said:

But would it be wise, or would it not rather be the extreme of folly to stop at this point [i.e., limitation], and to leave the Government entrusted with the care of the National defence, in a state of absolute incapacity to provide for the protection of the community, against future invasions of the public peace, by foreign war, or domestic convulsions?

The Federalist No. 34, p. 211.



C. This Court's Decisions

Respondents argued below that Gramm-Rudman effected a delegation of power from the Congress to an officer in violation of the separation of powers doctrine. Amicus submits that Gramm-Rudman is a delegation of power -- or, better, an abdication of power -- in violation of the structure of the Constitution.

While this Court has decided indefinite delegations of power as separation of power issues, see Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) this Court has also discussed delegations of power as structural issues. See J. Freedman, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307 (1976); cf. Industrial Union Dep't v. American



Petroleum Institute, 448 U.S. 607, 685  
(1980) (Rehnquist, J., concurring).

In National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), this Court suggested that the Congress could not delegate the power to tax. In National Cable Television, the Federal Communications Commission had imposed on cable systems a fee based on the number of their subscribers. See id. at 340. This method, the Court said, raised constitutional problems; as a consequence, the Court said it would construe the "Act [under which the Commission set the fee] narrowly to avoid the constitutional problems."

The problem was that the fee looked like a tax, because it was based not on the benefit conferred by the Commission upon the cable systems, but on the "public policy" of encouraging or discouraging such



systems. See id. at 340-41. "Public policy" in the "search of revenue" is a matter for the Appropriations Committee of the House, the Court said. Id. at 341. Encouraging or discouraging activity through assessments "are in the nature of 'taxes', which under our constitutional regime are traditionally levied by Congress." Id. "Congress . . . is the sole organ for levying taxes . . . ." Id. at 340.

This Court has implied on other occasions too that certain basic policy decisions must be made by the political departments. In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), this Court would not consider an interest asserted by the Civil Service Commission -- an interest in the naturalization of aliens -- because the Court said only the Congress and the





President could decide whether to further that interest. See id. at 103-05.\*<sup>2</sup>

In Regents of the University of California v. Bakke, 438 U.S. 265, 309 (1978), Mr. Justice Powell indicated that university regents are not competent to further an interest in remedying societal discrimination. By contrast, Justice Powell indicated in Fullilove v. Klutznick, 448 U.S. 448, 500 (1980), that Congress had a special competence to remedy discrimination. See id. at 472-73 (opinion of Burger, C.J. joined by White and Powell, JJ.) Thus, on at least three occasions, this Court and members thereof have implicitly recognized that certain

---

\*<sup>2</sup> In so holding, the Court quoted an earlier decision that "'the power to exclude or to expel aliens [or, on the contrary, to encourage entry and naturalization] is vested in the political departments of the government . . . ." Id. at 101 n. 31, quoting Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).



national decisions must be made not by delegates but by the politically responsive and competent departments of government, the Congress and the President. Those instances -- the imposition of a tax on cable subscribers; the promulgation of a civil service regulation to encourage naturalization; and the adoption of an affirmative action plan -- are not constitutionally different from the level of domestic and national defense appropriations. The political responsibility of the Congress and the President is equally strong, if not stronger, to decide the level of national appropriations as it is to decide a cable tax, a civil service regulation, or an affirmative action plan. The text of the Constitution and Hamilton's essays make it plain that the Congress and the President have the sole responsibility to decide



program by program the level of appropriations for such matters as the procurement of defensive weapons, military assistance to our allies, and humane support for those in despair.

Gramm-Rudman violates the structure of government as the Constitution's text describes it and the Framers intended it. Gramm-Rudman places ultimate responsibility for appropriations in the hands of an official with no known competence for such decisions, and certainly no constitutionally recognized competence. The official is not a deliberative body (and, indeed under the Act, has but five days to make decisions) and is not responsive to the people. Gramm-Rudman disables the Congress from directing that more be spent than the official decides, no matter what conditions warrant and no matter what additional revenue the Congress raises.



### CONCLUSION

Gramm-Rudman constitutes a major structural change in our Constitution. The advocates of Gramm-Rudman wish such changes. See S.J.R. 13 and S.J.R. 225 (99th Cong., 1st Sess. 1985). But, if such change is prudent, the route is constitutional amendment and not simple legislation.

Respectfully submitted,

Neil H. Cogan  
Attorney for Amicus Curiae  
Southern Methodist  
University School of Law  
3315 Daniel Avenue  
Dallas, Texas 75275  
(214) 692-2579

April, 1986